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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-9461

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8.

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED.

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

MOTION TO DISMISS ON BEHALF OF MADISON TEACHERS INCORPORATED.

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QUESTION PRESENTED

WHETHER A STATE, IN FURTHERANCE OF ITS LABOR POLICY OF RECOGNIZING THE PRINCIPAL OF EXCLUSIVE REPRESENTATION, MAY PROHIBIT CONDUCT BY A PUBLIC EMPLOYER (SCHOOL BOARD) WHICH CULMINATES IN SAID SCHOOL BOARD PERMITTING A REPRESENTATIVE OF A DISSIDENT MINORITY IN ITS BARGAINING UNIT TO SPEAK AND PRESENT AN EMPLOYEE PETITION ON A MANDATORY SUBJECT OF BARGAINING, THEN UNDER NEGOTIATION, AT A PUBLIC MEETING OF SAID SCHOOL BOARD.

STATEMENT OF THE CASE

The appellants (hereafter referred to as the school board, board or employer) and Madison Teachers, Inc. (hereafter referred to as MTI or union) were parties to a collective bargaining agreement covering teachers, among others. The agreement ran from January 1, 1971 to December 31, 1971. (Hereafter, all dates refer to the year 1971 unless expressly indicated otherwise.)

On January 25 the union submitted a proposal for a new contract to take effect January 1, 1972. This proposal contained a "fair-share" provision, i.e., a contractual requirement that all teachers join MTI or pay a proportionate share of the collective bargaining costs to MTI. (R. 39-40, 90). Fair-share was discussed throughout negotiations. (R. 51-54). The school board initially objected to fair-share on the ground that it was not authorized by law. (R. 53). Several times it urged the union to defer the fair-share proposal for another year. (R. 54). On October 4, MTI submitted a revised fair-share proposal contingent on passage of enabling legislation. The board's representatives rejected this proposal as "permissive". (R. 53).

Enabling legislation became effective November 11 by Chapter 124, Laws of 1971. On November 17 the union submitted its third fair-share proposal to conform with the new law. (R. 41, 52). By this time, however, thirteen unresolved issues crowded the bargaining table. Two of them loomed large: (1) fair-share, and (2) final and binding arbitration of teacher dismissals and nonrenewals. The employer had opposed both arbitration and fair-share throughout negotiations. On the other hand, one of its bargaining representatives indicated,

informally, that (a) fair-share possibly might be accepted by the board although arbitration of dismissals and nonrenewals could not possibly be accepted; (R. 91) and (b) two members of the board would approve fair-share if the union withdrew its arbitration proposal. (R. 73).

On November 14 teachers Holmquist and Reed sent a letter to all teachers which said, inter alia: "SAVE FREEDOM OF CHOICE/ A Closed Shop (Agency Shop) Removes This Freedom". (A-Ap. p. 141). The letter solicited responses, and two hundred were received. A meeting was set for December 2, and fourteen attended, half of whom were MTI members. A petition to defer fair-share was developed (A-Ap. p. 145) and was immediately distributed among teachers along with a "Points of Information" bulletin (A-Ap. p. 144) and a cover letter. (A-Ap. p. 142).

Employer agents knew of the Holmquist-Reed activity. On December 6, Reed, upon his request, was given permission by two school principals to circulate the petition among the teachers and to use the teachers' mailboxes for distribution of a letter. (R. 135-136). The letter urged deferral of fair-share. (A-Ap. p. 145). In addition to the principals' knowledge, MTI representative John Matthews specifically told board member Yelinek, only minutes before the board's regular December 6 meeting, that individuals other than MTI representatives reportedly intended to speak to the board on negotiable items. Furthermore, Matthews presented Yelinek with the language of the circuit court decision in Board of Sch. Directors of Milwaukee v. WERC (1969), 42 Wis. 2d 637, 647, 168 N.W. 2d 92, which restrains such speaking. To Matthews' query whether MTI should bring this matter to the

attention of the board, Yelinek said he (Yelinek) "would take care of it". (R. 42-43).

Still only minutes before the December 6 board meeting, Matthews met with Holmquist and Reed. He apprised them of the same circuit court decision. (R. 65-67). Matthews urged Holmquist and Reed not to make a presentation against fair-share "or we were going to lose the whole ballgame". (R. 73-74).

Nevertheless, at the portion of the meeting called "Public Appearances" Holmquist rose to speak. He had concluded that people were confused as to the meaning of fair-share. His aim was to defeat fair-share this time around. "***[M]y purpose was to end the confusion by deferral". (R. 126). He said to the board (R. 46, 47, 91, 118-119; see Commission's Finding of Fact #12 (A-Ap. pp. 137-138)):

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package."

He then read the petition:

> "To: Madison Board of Education, Madison Teachers Incorporated. We the undersigned ask that the fair-share proposal (agency shop)

being negotiated by Madison Teachers Incorporated and the Madison Board of Education be deferred this year. We propose the following: 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public."

He added:

"We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific ... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation."

School board president, Mrs. Doyle, asked whether Holmquist intended to communicate the petitions to the board, and Holmquist responded affirmatively. (R. 47, 48, 119).

MTI feared Holmquist's action was:

> "*** the most damaging thing to our strategy that had occurred in the last two years. *** [I]t undermined the strategy we were attempting. It hurt us drastically" (R. 92).

The board repaired to executive session. It passed a resolution which said: (R. 49, 155)

> "It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and not including agency shop: if the MTI does not accept this as a total package the offer of arbitration is withdrawn." (Emphasis the board's.)

Negotiations resumed the next day. The board had a new team. Superintendent Ritchie opened the meeting by presenting the above-quoted board resolution and saying "This is the deal" (R. 48-49). MTI conceded.

> "We decided *** that was the best we were going to get in view of the motion that was passed by the board the night before" (R. 75).

The union filed a complaint with the Wisconsin Employment Relations Commission (hereafter referred to as commission) on January 6, 1972, alleging that the employer had committed prohibited

practices in violation of sec. 111.70(3)(a)1. and 4., Stats. On September 13, 1972, the commission concluded the employer had committed such practices and ordered that the employer (A-Ap.pp. 140-141):

> "Shall immediately cease and desist from permitting employes, other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc."

The employer petitioned the Dane County Circuit Court for review under ch. 227, Stats. MTI intervened. The circuit court entered its written decision on October 2, 1973 (A-Ap.pp. 126-131). Judgment affirming the commission and dismissing the petition for review was entered October 12, 1973. The employer appealed said decision to the Wisconsin Supreme Court. The Wisconsin Supreme Court affirmed the Dane County Circuit Court decision (A-Ap.pp. 101-115) and subsequently denied Appellant's Motion for Rehearing.

Stage and manner in which federal question was presented and decided below.

Prior to hearing, appellants made the following motion:

> "I also move to dismiss because, even assuming that everything occurred in the Complaint and is true, to deny a teacher the opportunity to speak at a public meeting would deny the teacher of her civil rights as guaranteed by the U.S. Constitution, the Wisconsin Constitution and Section 111.70." (Record Page 35).

Clearly, the appellant, from the very beginning of this case, was asserting the constitutional rights of Albert Holmquist and not constitutional rights that the Appellant had any standing to assert. The entire record reflects a failure by the appellant to distinguish between the rights of Albert Holmquist or teachers in general and the appellant.

ARGUMENT

This case does not fall within the appeal jurisdiction of the United States Supreme Court and is not otherwise appropriate for consideration by the Court.

A. The appellants never drew into question the validity of any state statute.

This case commenced with the filing of a prohibited labor practice complaint with the Wisconsin Employment Relations Commission by Madison Teachers Inc. The complaint alleged prohibited practices by the appellants on the basis that the Board of Education permitted a representative of a dissident minority in its bargaining unit to appear at a public meeting of the Board and to speak to the Board in regard to a mandatory subject of bargaining then under negotiation. It was and is the contention of Madison Teachers Inc. that the circumstances surrounding Mr. Holmquist's statements to the Board of Education constituted "negotiating" or "bargaining" with someone other than the exclusive collective bargaining agent.

In their answer to the complaint, the appellants contended that Holmquist's remarks made at the Board meeting "involved solely the giving of a position statement at an ordinary meeting of a public

body and thus cannot be labeled as negotiating." (A-Ap. pp. 148-149). All parties agree that it is the duty of the appellants to bargain exclusively with Madison Teachers Inc. (A. brief pp. 12-13; A-Ap. p. 155).

The Dane County Circuit Court stated:

> "The crux of this case thus reduces to whether Holmquist's 'statement' before the board constituted 'negotiation' or was merely the giving of a 'position statement.' " (A-Ap. p. 130).

The Wisconsin Supreme Court expressed a similar view (A-Ap. p. 111). The Wisconsin Employment Relations Commission, the Dane County Circuit Court and the Wisconsin Supreme Court all concluded that the facts in this case support the conclusion that Holmquist's statement constituted "bargaining" or "negotiating". The Supreme Court concluded:

> "Even though Holmquist's statement superficially appears to be merely a 'position statement', the court deems from the total circumstances that it constituted 'negotiating'." (A-Ap. p. 113).

The Court had previously stated that a mere position statement at an ordinary meeting of a public body would not constitute negotiating (Board of Sch. Directors of Milwaukee v. WERC, 42 W 2d 637, 652; 168 N.W. 2d 92 (1969); A-Ap. p. 113). The fact is that Mr. Holmquist did not speak to the Board of Education as a taxpayer/citizen. He spoke explicitly in the capacity of a representative of a dissident group of 72 bargaining unit teachers. His speech in that capacity, on a mandatory subject of bargaining then being bargained, is not a

mere position statement, especially when viewed in the context of the total circumstances.

It is the above judicial determination (that Holmquist's statement constituted bargaining) that is being challenged in this case -- not the constitutionality of any statute (see A. brief 12-13). Close scrutiny of the appellant's brief at pp. 12-13 reveals that the appellants are really challenging the constitutionality of the Wisconsin Courts' finding of fact characterizing Holmquist's statement as "bargaining" or "negotiating".

The decision of the Wisconsin Employment Relations Commission does not come within the meaning of the phrase "statute of any states" and does not constitute legislative action or possess legislative characteristics within the meaning of Lathrop v. Donohue, 367 U.S. 820 (1960). The Wisconsin Employment Relations Commission decision is judicial in nature; it is a decision which holds that the appellants committed an unfair labor practice under a particular set of facts. It has no general applicability to all public bodies as contended by the appellants (brief p. 8). In Allen-Bradley Local No. 1111 etc. v. Wisconsin Employment Relations Board et al., 237 Wis. 164, 295 N.W. 791, the Court stated that the Wisconsin Employment Peace Act "affects the rights of parties to a controversy pending before the Board only in the manner and to the extent prescribed by the Order."

B. The appellants lack standing.

Whether an appellant has standing to challenge a state statute in the U.S. Supreme Court is a separate issue to which the Court must bring its independent judgment. Cramp v. Board of Public

Instruction of Orange County, Florida, 368 US 278 (1961). It is respectfully submitted that the appellants herein lack standing.

Officials in their official capacities do not have standing to challenge the constitutionality of their state's own laws. Smith v. Indiana, 191 U.S. 138 (1903) held that a personal interest rather than a mere official interest is necessary to assert constitutional rights in opposition to a state court ruling. The appellant must show a personal deprivation of Federal constitutional rights to properly challenge state law. Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op, 276 US 71 (1928). The appellants herein have asserted no personal constitutional rights or claims. The school board alleges a "personal" stake in the outcome of this case on the basis that it is "duty bound to respect the constitutional rights of the general public and its teacher employees' citing Board of Education v. Allen, 392 US 236 (1968) and Pickering v. Board of Education, 391 US 563 (1968). Neither of these cases is supportive of appellant's position, especially on the question of jurisdiction. The Board of Education v. Allen case involved a refusal of the Board of Education to implement a law it believed to be unconstitutional and the board members consequently faced expulsion from office, while their school district faced a loss of state funds. In Pickering, the appellant was personally injured when the school board dismissed the appellant for publicly commenting on school matters. The instant case contains no equivalent personal stake on the part of the appellants which can serve as a basis for jurisdiction.

Furthermore, appellant's assertion that they fear personal liability is unwarranted and at best

extremely remote and speculative. No one has in fact been injured. In Sierra Club v. Morton, 405 U.S. 727 (1972) the court enunciated the injury in fact test. The party seeking review must demonstrate injury to a cognizable interest that he/she has suffered. One simply has no standing to litigate an issue unless "he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement." Doremus v. Board of Education, 342 U.S. 429, 434 (1952); Cramp v. Board of Public Instruction of Orange County, Florida, supra; Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488.

Appellants claim standing to assert the constitutional rights of its teacher employees, despite long established authority to the contrary. Appellant argue that the "need to protect fundamental rights ... will prompt courts on grounds of broad constitutional policy to proceed without blind adherence to technical rules of representation" (brief, p. 10) and cite Barrows v. Jackson, 346 U.S. 249 (1953) and Smith v. Board of Education 365 F (2d) 770 (8th Cir. 1966) as authority for said proposition. In Barrows the Court found the appellant to have a real financial interest that provided a basis for standing to assert the constitutional issues presented by that case. In Smith, the appellant was a member of the class for which fundamental rights were being asserted. Smith was actually injured under the law challenged as unconstitutional. The appellants herein do not have standing to protest constitutional infringements, if any, suffered by their teacher employees.

*** Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1972).

Neither Holmquist, nor anyone else has suffered injury in fact and the appellants lack standing to seek relief for injuries which are not their own.

Appellants' brief grossly distorts the Wisconsin Supreme Court Decision (brief pp. 11-12). The Wisconsin Supreme Court does not require " ... boards of education to refuse to permit certain teacher employees the opportunity to speak and petition at regular public meetings." (brief pp. 11-12). Accurately stated, the Wisconsin Supreme Court merely held that under the Wisconsin Municipal Employment Relations Act, certified majority bargaining agents have exclusive negotiating rights with the employer. Holmquist or any other public employee can speak and petition to their heart's content so long as they do not intrude upon the collective bargaining or negotiating prerogatives of the exclusive majority bargaining agent. The Court properly declined to reverse the finding of fact that Holmquist's conduct constituted bargaining. The issue is the exclusivity of the collective bargaining function -- a policy that has been subjected to the scrutiny of this Court and found to be constitutionally permissible. See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-685 (1944); and the very recent case of the Emporium Capwell Co. v. Western Addition Community Organization, 420 US 50 (1975). Certainly the same labor relations policies that are endorsed on the federal level cannot be deemed constitutionally impermissible when adopted by the states. The Wisconsin Supreme Court stated in its decision: "The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts." (A-Ap.p. 110.) This narrow restriction is constitutionally permissible. Such a policy has been endorsed by the federal government and the State

of Wisconsin " ... to avoid the dangers attendant upon relative chaos in labor-management relations." (A-Ap. p. 111).

C. This case is not ripe and concrete for adjudication.

This Court has limited its jurisdiction to actual cases and controversies. In United Public Workers v. Mitchell, 330 U.S. 75 (1947) the Court stated:

> "Should the courts seek to expand this power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories."

In United Public Workers the Court held that appellants could not challenge the constitutionality of the Hatch Act without a showing of injury in fact.

In International Longshoreman's Warehouseman's Union v. Boyd, 347 US 222 (1954), the Court refused to rule on the applicability of a statute that had not yet been applied to appellants.

In the present case, the ruling being challenged has not yet in fact been applied to anyone. Holmquist, in fact, was not prevented from speaking. The effect and validity of the challenged ruling on "future activities of every public body in Wisconsin" (brief p. 13) remains to be seen and judged if and when the occasion presents itself. In the meantime, the consideration of the constitutionality of such potential application by public bodies is premature and speculative.

In Allen-Bradley Local No. 1111, etc., v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942), the Court stated at p. 746:

> We deal, however, not with the theoretical disputes but with concrete and specific issues raised by actual cases. (cases cited). Constitutional questions are not to be dealt with abstractly (cases cited). They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us (cases cited). Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the Federal Constitution or an Act of Congress (cases cited).

D. There is no substantial federal question.

The Appellee does not challenge the importance of First Amendment Rights; it asserts however that none are at stake in this case. Neither Holmquist nor anyone else has in fact been prevented from exercising any first amendment right. The only real issue is whether Holmquist's statement has properly been characterized by Wisconsin authorities as "bargaining" or "negotiating" (see A. brief, pp. 12-13). It is clear that such a factual determination is strictly within the purview of the State, especially where such finding is made pursuant to interpretation of a state statute and does not have actual impact on any federal right. See Allen Bradley Local No. 1111, etc., v. Wisconsin Employment Relations Board, supra.

Appellants display much ambiguity as to exactly what rights are being asserted in this appeal. The Appellants state:

> The Appellants have conceded that speech in the form of bargaining or negotiating for a labor agreement can be constitutionally restricted to the exclusive representatives of a bargaining unit. (A. brief pp. 12-13).

Having conceded the above, however, the appellants argue that the present case does not involve bargaining because the employer only listened to but did not confer with someone other than the exclusive bargaining agent. It is unclear whether appellants are seeking to vindicate the Employer's conduct from being labeled as an unfair labor practice or whether the Appellants are asserting that someone whose interests they have standing to assert, has in fact been deprived of first amendment rights. Appellants' concession, when considered in conjunction with the appellants' assertion that first amendment rights have been violated in this case amounts to a novel and unfounded interpretation of first amendment rights. The appellants actually argue that Holmquist's statements were protected by the First Amendment, but if the School Board had responded to Holmquist (conferred with him) then his same statement could be constitutionally restricted. Certainly, whether an actual settlement or agreement is ultimately reached does not determine whether bargaining has transpired. Whether the appellants continued to negotiate with the exclusive representative is also irrelevant. Exclusivity is the issue. Medo, supra, and Emporium Capwell, supra, demonstrate a long standing and thorough endorsement of the validity of the principle of exclusive representation in the area of labor relations and the importance attributed to said principle by the Court. Emporium Capwell, supra, is an example where this Court found unilateral action by bargaining unit members to be properly restricted on the basis of the principle of exclusive representation. Certainly the concurrence of Wisconsin with this federally recognized principle is clearly permissible. The fact that this important labor policy is being applied to a public employer is no basis for distinction. There

is no constitutional requirement to accord public employers or dissident public employees the freedom to maim the collective bargaining process by repudiating or undermining the exclusivity of a certified majority bargaining representative. The guise of preserving free speech rights does not provide conduct that undermines the policy of exclusivity of representation in the field of labor relations with the umbrella of constitutional protection, the employer's interests to the contrary notwithstanding. There is no real significance to the question of whether the determination by Wisconsin authorities that Holmquist's statement to the Board of Education on December 6, 1971 constituted bargaining is supported by the evidence. It has not been asserted or demonstrated that Holmquist's statement or the decision that followed in its aftermath have resulted in any actual intrusion on anyone's First Amendment rights, including those of the appellants herein.

CONCLUSION

The constitutionality of a state statute has not been properly drawn into question. There has been no actual infringement of any federal constitutional right. The appellants do not have sufficient personal stake nor do they assert any actual harm or injury by the order sought to be reviewed. There is no justiciable issue. There is no substantial federal question. Accordingly, the Appellee moves for dismissal of this appeal for want of jurisdiction. In the alternative, since the principle enunciated and endorsed by the Wisconsin Supreme Court is so

clearly and firmly established in the law, the appellee moves for affirmance of the judgment below.

Respectfully submitted

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